UNITED STATES – CERTAIN MEASURES AFFECTING IMPORTS OF POULTRY FROM CHINA

(WT/DS392)

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

February 1, 2010

I. INTRODUCTION

1. Section 727 was justified under GATT Article XX(b). The measure, which was enacted in the context of an ongoing equivalence determination, was necessary to protect human and animal life and health against the risk posed by Chinese poultry. Section 727 was necessary to ensure FSIS thoroughly considered China's systemic food safety problems, its widespread food safety crises, and its enactment of a new food safety law before "implementing" or "establishing" rules that would allow China to export its potentially dangerous poultry to the United States.

2. Throughout this dispute, China has attempted to distract the Panel from the question of Section 727's necessity for poultry. For example, China implies that Section 727 was not necessary because it did not apply more broadly to all Chinese products; however, this argument ignores the fact that poultry was the only product subject to an equivalence determination when Section 727 was enacted. Similarly, China downplays the relevance of its many food safety crises, but ignores the concerns that they raise about its ability to enforce its food safety laws. Finally, China argues that Section 727 is arbitrarily or unjustifiably discriminatory while ignoring distinctions between China and others who have tried to export poultry to the United States.

3. The U.S. submission will focus on the key issues that China has chosen to ignore. In doing so, the United States will rebut China's flawed arguments and again demonstrate Section 727's justification under GATT Article XX(b).

4. In addition, the United States will address China's arguments, first submitted in its oral statement at the first substantive meeting, that Section 727 is subject to the SPS Agreement and inconsistent with certain SPS Agreement obligations. Any claims by China under the SPS Agreement are not within the Panel's terms of reference. Further, China has failed to show either that the SPS Agreement provisions cited by China apply to Section 727, or that Section 727 is inconsistent with those provisions. Finally, as China's substantive arguments under its SPS claims are essentially the same as those presented in connection with Article XX(b) of the GATT 1994, there is no need for the Panel to address these additional claims under the SPS Agreement.

II. SECTION 727 IS JUSTIFIED UNDER GATT ARTICLE XX(b)

5. Section 727 was justified under GATT Article XX(b). Section 727 was within the scope of the XX(b) exception because it was necessary to protect against the risk posed by the importation of Chinese poultry. At the same time, Section 727 was consistent with the chapeau because it was not applied against China in a manner resulting in arbitrary or unjustifiable discrimination, nor was it a disguised restriction on international trade.

6. The United States has demonstrated that Section 727 falls under the scope of the Article XX(b) exception because its policy objective was to protect human and animal life and health from the risk posed by Chinese poultry. Since China has not challenged this element, the United States will focus on issues related to Section 727's necessity.

7. Section 727 was necessary to protect against the risk posed by the importation of Chinese poultry. China has struggled with corruption, smuggling, and the lax enforcement of its food safety laws. In addition, avian influenza exists in China, and China has suffered numerous food safety crises in past years. As a result, China was in the process of overhauling its food safety law when Section 727 was enacted. At the same time, China was also in the midst of an ongoing equivalence proceeding for poultry. Therefore, Section 727 was necessary to ensure that FSIS fully considered China's systemic food safety problems before "establishing" or "implementing" rules that would allow China to export poultry products to the United States.

8. This conclusion is consistent with the analysis used by the Appellate Body to determine whether a measure is necessary, which involves a weighing and balancing of multiple factors (importance of the policy objective, contribution of the measure to its policy objective, trade restrictiveness). All of these factors support Section 727's necessity.

9. Section 727 directly contributed to the protection of human and animal life and health by ensuring FSIS did not implement" or "establish" rules related to China's equivalence without fully considering the systemic problems with China's food safety system and their relevance to China's poultry inspection system. Before China's equivalence application, FSIS had never before been confronted with a situation that presented such severe systemic problems with food safety law enforcement or such numerous and widespread food safety crises. Therefore, Section 727 was necessary to ensure FSIS adequately dealt with these unique issues.

10. To help accomplish this task, the JES accompanying Section 727 specifically directed FSIS on how to move forward with China's equivalence determinations. In accordance with the JES, FSIS developed an action plan shortly after Section 727 took effect. FSIS implemented the action plan's first three steps during 2009. FSIS reviewed and summarized all of its documentation related to China's equivalence application and reached out to China via letter on May 12, 2009. This letter included a summary of the documents FSIS had uncovered and requested that China provide any changes to its relevant food safety laws to FSIS for review.

11. FSIS needed updated documentation from China to complete the document review step, a normal part of the equivalence process under the PPIA. However, because China did not provide the requested information, FSIS has not been able to complete its document review or any of the action plan's subsequent steps, such as the on-site audits, which are also part of the PPIA. If China had provided this information, FSIS could have taken further actions under the PPIA.

12. In response to its experience evaluating China's equivalence and Section 727, FSIS has reconsidered the extent to which the agency communicates with U.S. trading partners and the extent to which it considers food safety issues that do not directly involve meat, poultry, or egg products. In the past, FSIS limited its equivalence evaluations to the information provided by the country regarding its food regulatory systems for meat, poultry, or egg products. Now, FSIS has expanded the scope of its equivalence review to consider information that does not directly involve the products it regulates but have a bearing on the integrity of the country's food safety system. This new process will apply to China's equivalence review as well as the review of other countries. FSIS believes that this will help address some of the issues raised by China's equivalence application and U.S. consumers will be better protected as a result.

13. During 2009, FSIS took other steps to improve the equivalence process. For initial equivalence determinations, FSIS revised the Self-Assessment Tool it asks exporting countries to submit as a part of their initial application. Similarly, for ongoing monitoring of equivalent countries, FSIS improved its audit methodology to better ensure the ongoing adequacy of system controls after a country has been found equivalent. FSIS believes these new processes will be more effective and has requested all of its trading partners, including China, adhere to them.

14. In response to the issues raised by China's equivalence application, the rest of the U.S. Government has also taken action to evaluate and address the risks posed by Chinese poultry imports. In June 2009, the House Agriculture Appropriations Subcommittee held a hearing to

examine "the process the U.S. Department of Agriculture used to determine China's equivalency to export processed poultry to the United States." USDA also released a report in June 2009 thoroughly examining the safety of food imported from China. Further, in March 2009, President Obama created a Food Safety Working Group focused on enhancing U.S. food safety laws, including improving the United States' ability to ensure the safety of imported food from China and other countries. These actions all made a material contribution to the protection of human and animal life and health, the vitally important policy objective of Section 727.

15. China argues that its widespread food safety crises are not relevant to Section 727's necessity. The United States disagrees. In fact, China's melamine crisis and many other non-poultry crises are relevant to an equivalence decision because they raise questions about a country's ability to enforce its food safety laws. And enforcement problems are particularly troubling in the context of an equivalence regime. The reason for this is that after FSIS has made its initial equivalence determination for a particular exporting country, it relies on that country to enforce its laws to ensure that the U.S. level of sanitary protection is being met. And if the exporting country fails to enforce its laws, it could pose a direct risk to the life and health of those who consume the poultry produced in potentially dangerous conditions.

16. China argues that Section 727's necessity is undermined by the fact that the measure did not apply to other Chinese products. In essence, China's argument appears to be that a Member may not take action to protect life or health from the risk posed by a particular product until after that Member has evaluated the risks posed by all products, and any action must be comprehensive with respect to all products. But of course nothing in Article XX(b) says this, nor does Article XX(b) say that a Member must delay action to protect life or health until after such a comprehensive approach can be put in place. Not only does China's approach have no basis in the text of Article XX(b), but it does not make sense to say that Members agreed that they could not apply measures to protect life or health with respect to particular products, but only with respect to all products. It is clear that the delays inherent in such an approach, and the resultant risks to life and health, would not be acceptable to Members.

17. In addition, there were several very good reasons why Section 727 applied only to poultry. First, poultry is subject to FSIS's equivalence regime, which is different from FDA's regime for ensuring the safety of the products under its jurisdiction, which include all of the food products China has exported to the United States to date. While FSIS and FDA share a similar goal – namely, ensuring that imported food is safe – they use different legal frameworks to achieve this goal.

18. Under FSIS's equivalence system, countries desiring to export an FSIS-regulated product to the United States must apply to FSIS for approval. FSIS's approval process examines whether a country's inspection system achieves the same level of sanitary protection as the U.S. system. If FSIS determines that the foreign country's system is equivalent, the country is then approved to export that product to the United States. Although FSIS conducts follow-up audits, FSIS generally relies on the exporting country to enforce its laws to ensure that its inspection system continues to achieve the U.S. level of sanitary protection after the initial determination is made. If a country fails to enforce its laws, this level of sanitary protection may not be maintained.

19. By contrast, FDA does not require an exporting country's system to be found equivalent to the U.S. regulatory system prior to allowing the entry of food products. Rather, FDA approaches compliance on a firm-by-firm basis, and any firm whose products comply with

applicable FDA requirements can ship to the United States. When the product reaches the U.S. border, it is then examined for violations of FDA requirements. If a violation is found, FDA works with the firm to have the product brought into compliance. If the product cannot be brought into compliance, it is re-exported or destroyed.

20. These differences between the regulatory regimes are relevant to the question of Section 727's necessity. The reason is that China's lax enforcement of its food safety laws raise particular concerns in the context of an equivalence regime that relies on the exporting country to enforce its laws to ensure that the U.S. level of sanitary protection is maintained that may not be raised in other contexts. Thus, Section 727 was necessary in the context of FSIS's equivalence regime to ensure that China did not export potentially unsafe poultry to the United States.

21. Second, China had never before tried to export a product under FSIS's jurisdiction to the United States, and before China's poultry application, FSIS had never before been faced with a review of any food inspection system within China. Therefore, FSIS was not accustomed to dealing with a country with such severe food safety problems. Given the unique nature of the task FSIS was facing, Section 727 was necessary to ensure the agency more thoroughly considered its ultimate determination on the equivalence of China's poultry inspection systems. Further, because poultry was the only product from China with a pending equivalence application, Section 727 was targeted to only affect the equivalence of poultry products.

22. Third, China's poultry industry has suffered from food safety crises. For instance, in 2008, melamine was found in animal feed that was consumed by chickens in China and in eggs laid by Chinese chickens. As a result of this, China's Health Secretary stated that China would begin testing chicken meat for melamine. Similarly, in 2006, ducks and hens in China's Hebei and Zhejiang Provinces were fed carcinogenic red dye so their red-yolk eggs would sell for a higher price. Poultry from China was also smuggled into the United States in 2006. Further, China is a country where avian influenza is known to occur. This is of particular concern due to China's problems with lax food safety enforcement. Under APHIS regulations to prevent the spread of avian influenza, any poultry exported to the United States must be fully cooked or otherwise processed sufficiently to kill the avian influenza virus. Thus, China's poor enforcement track record raised concerns about whether Chinese authorities would enforce APHIS's requirements to protect against the potential spread of avian influenza.

23. Finally, Section 727 is not the only measure that the United States has taken to address the risk posed by unsafe Chinese imports. In fact, FDA has issued import alerts against Chinese products that it has determined are unsafe, including red melon seeds, bean curd, dried fungus and mushrooms, fresh garlic, honey, farm-raised fish, wheat gluten, rice protein products, shrimp, eel and milk products. FDA refuses a much higher proportion of food from China than other countries. Further, FDA in 2007 also negotiated a Memorandum of Understanding (MOU) with China to address its concerns about the melamine crisis.

24. Despite the numerous problems FDA has had with Chinese imports, China continually refers to its increasing exports of these products in an attempt to undermine Section 727's necessity. For example, China rhetorically asks why the U.S. Congress did not cut out funding to allow the import of products regulated by FDA. Putting aside whether China believes it would be advisable to take this action, the implication that the United States has not acted against other unsafe Chinese products is simply untrue. The United States will and does take appropriate measures to protect human life and health when it is necessary to do so. For example, while

Section 727 was necessary to achieve this goal in the context of poultry, FDA's import alerts and an MOU were necessary in the context of other Chinese food products.

25. If China's export statistics prove anything, it is that the United States is willing to trade with China when it can be confident that the products China is exporting are safe. That said, the fact remains that FDA's treatment of products under its jurisdiction is simply not relevant to whether Section 727 was necessary to protect against the risk posed by poultry imports from China. The Panel need not examine whether the United States could have or did take additional steps to address concerns about other Chinese food products. The only question before the Panel is whether Section 727 was necessary to protect human and animal life and health based on concerns about Chinese poultry. As the United States has demonstrated, this was the case.

26. While the United States bears the burden to demonstrate that Section 727 was necessary in accordance with Article XX(b), it does not have to "show in the first instance, that there are no reasonable alternatives to achieve its objective." Rather, the complaining party must put forward a reasonably available WTO-consistent alternative. In the instant dispute, China has failed to present a reasonably available alternative that achieves the U.S. level of protection, which requires that processed and slaughtered poultry be safe. China's proposed alternative – "the application of normal FSIS procedures" – is not an alternative at all. Rather, China's suggestion that the U.S. adopt this so-called "alternative" is simply another way of saying that Section 727 was not necessary in the first place. In this sense, China is making a circular argument.

27. Section 727 also complies with the Article XX(b) chapeau because it is not applied in a manner that results in arbitrary or unjustifiable discrimination against China nor is it a disguised restriction on trade. Because China does not appear to be challenging Section 727 as a disguised restriction on trade, the United States will focus its discussion on the issue of discrimination.

28. Section 727 did not discriminate against China in an arbitrary or unjustifiable manner. At the time the measure was enacted, Chinese poultry was the subject of an ongoing equivalence review. An action taken in the context of an equivalence review of a particular country's food inspection system will, by its very nature, make explicit reference to that country. The country-specific nature that is inherent in an equivalence review does not, as China seems to argue, automatically raise questions of arbitrary or unjustifiable discrimination.

29. In addition, Section 727 did not deny China access to the PPIA. The legal impact of an appropriations restriction is limited to its explicit terms. Section 727 states that "None of the funds made available in this Act may be used to establish or implement a rule allowing poultry products to be imported into the United States from ... China." Section 727's legal effect is limited to prohibiting the "establishment" or "implementation" of equivalence rules for Chinese poultry, nothing more. In accordance with the action plan accompanying Section 727, FSIS was permitted to engage in activities related to the equivalence rulemaking during fiscal year 2009. This includes actions that are part of the PPIA. Therefore, China was not discriminated against vis-a-vis other WTO Members because it was not denied access to the PPIA.

30. China also argues that it was discriminated against because the United States is not applying the same ALOP to Chinese poultry as it is applying to poultry from other WTO Members. China's assertion is untrue. In general, the United States requires that poultry be safe. However, requiring the same ALOP for all Members who are seeking to export poultry products to the United States does not mean that all of these Members will have identical experiences with

the equivalence process. Some Members will take a long period of time to achieve equivalence, while others may never be found equivalent. These different experiences by Members seeking to export poultry products to the United States make sense. In order to ensure that its ALOP is met, the United States may have to take different steps in different circumstances in order to respond to the particular challenges that each application presents.

31. China also compares itself with those WTO Members who have achieved equivalence for their poultry inspection systems and are currently eligible to export poultry products to the United States in an attempt to show discrimination. However, Section 727 did not arbitrarily or unjustifiably discriminate against China vis-a-vis these Members because the same conditions did not prevail in any of them as prevailed in China when Section 727 was enacted.

32. From a broad standpoint, China is unlike any of the other Members whose poultry inspection systems have been found equivalent with that of the United States. The reason for this is that none of these Members have experienced widespread food safety crises that have raised fundamental concerns about the Member's ability to enforce its laws. In addition, none of these countries have dealt with an issue like the melamine crisis, which the head of the World Health Organization dubbed "one of the largest food safety events the agency has had to deal with in recent years." Thus, it is not accurate to say that the same conditions that prevail in these Members prevailed in China at the time that China was going through the equivalence process.

33. Another distinction between China and these Members is that many of them had been trading with the United States under an "equal to" regime for many years without significant incident before their applications for equivalence were considered. Indeed, FSIS's equivalence process only dates to 1995 and the adoption of the Uruguay Round Agreements Act. Before that time, Canada, France, Great Britain, Israel and Hong Kong had already been exporting poultry products to the United States under FSIS's old regime and all of these countries had a history of supplying safe products without incident. Thus, at the time these WTO Members were subject to FSIS's equivalence process to determine whether they could continue to import poultry products to the United States, FSIS already had confidence in their systems for ensuring the safety of the poultry that they produced. Therefore, their situations were different from China's, which had never before exported poultry to the United States when it applied for equivalence in 2004.

34. Many of these Members also had a history of exporting meat products to the United States at the time they applied for equivalence for poultry. For example, Chile was found eligible to export meat products to the United States in 2005 before it was found eligible to export poultry in 2007. Thus, at the time FSIS was examining Chile's poultry inspection system, it already had familiarity with Chile's inspection controls and had confidence that Chile could be relied upon to enforce its law to ensure that the poultry it exported to the United States was produced in conditions that met the U.S. level of sanitary protection. Similarly, both Australia and New Zealand had exported meat products at the time they were found equivalent for ratites.

35. Among the equivalent Members that China compares itself with, it singles out Mexico as a Member who has had problems with food safety enforcement. While it is true that FSIS found some deficiencies during audits of Mexico's meat and processed poultry system, it is not unusual to find at least some deficiencies during audits of food regulatory systems. In general, when deficiencies are found, the Member is advised of the deficiencies and then initiates appropriate corrective actions. During the next audit, FSIS verifies the effectiveness of the corrective actions taken by the country. This is the process that was followed after the Mexico audits. Because

Mexico took immediate and appropriate actions, FSIS continues to have confidence in the ability of Mexico's meat and poultry inspection system to produce products for export to the United States that are wholesome and not adulterated. Further, the United States is also not aware of such widespread crises in Mexico as have occurred in China and is not aware of any broad systemic problems that raise significant questions about Mexico's ability to enforce its own laws to the extent that they do with China. Finally, it is notable that Mexico is still not equivalent for slaughtered poultry.

36. China was also not discriminated against vis-a-vis other countries that China alleges have food safety enforcement problems. For example, China notes that "in Bangladesh, reports indicated that two children died and more than forty people were sickened with viral encephalitis contracted from eating poultry." The reason this comparison does not prove discrimination is simple – unlike China, Bangladesh has not filed an equivalence application for poultry and is not actively seeking to export to the United States. As a result, even if Bangladesh's food safety problems, and in particular its problems with enforcement, were established and shown to be of the same magnitude as China's, China is not being discriminated against vis-a-vis Bangladesh.

37. Finally, China was not discriminated against vis-a-vis all 151 other WTO Members. First of all, as the United States has explained, China continued to have access to the PPIA. Second, only a small subset of these 151 Members had submitted an equivalence application and shown an interest in exporting poultry to the United States. Further, among the 28 Members seeking to export to the United States, none of them was as far along in the process as China when Section 727 was enacted. Finally, among the majority of those Members who have submitted equivalence applications for poultry, and certainly among those whose have made significance progress, the United States is not aware of problems of the same magnitude as exist in China. China even cites one of these Members, Korea, as an example of a Member "known for requiring strict levels of sanitary protection." This fact alone would seem to distinguish Korea from China.

38. Thus, although China may compare itself to numerous other Members and claim that it is being discriminated against when compared with these Members, this is simply not the case. Section 727 was not applied against China in a manner that resulted in arbitrary or unjustifiable discrimination. To the contrary, the measure was justified by legitimate concerns that existed with regard to China, and the measure did not arbitrarily or unjustifiably discriminate against China vis-a-vis any other WTO Member.

III. CHINA HAS FAILED TO SHOW THAT SECTION 727 RESULTS IN A BREACH OF ANY OBLIGATION UNDER THE SPS AGREEMENT

39. In it oral statement, China for the first time alleged that Section 727 was enacted for food safety purposes and is subject to several different obligations of the SPS Agreement. As the complaining party, China has the burden of proving that Section 727 meets the definition of an SPS measure and of explaining how each SPS provision cited applies to the measure. But China has not met its burden, and China mainly relies on inapposite provisions of the SPS Agreement.

40. In particular, the central provisions of the SPS Agreement on equivalence processes are contained in Article 4, *Equivalence.* Article 4 recognizes that Members may adopt equivalence-based regimes to ensure the achievement of their ALOP, and provides certain obligations with respect to equivalence-based systems. Equivalence systems are premised on the differential treatment of products from different WTO Members. That is, under Article 4.1, importing

Members need only accept the equivalence of SPS measures in exporting countries if the exporting Member objectively demonstrates that the measures meet the importing Member's appropriate level of protection. Likewise, under Article 4.2, recognition agreements need not be reached with all Members. The existence of SPS Article 4 helps show that China's basic approach is flawed. The question is not whether China is treated differently than other Members – indeed, the course of proceedings and the outcome of each equivalence determination necessarily will be based on the specific facts and circumstances of the exporting Member's SPS measures.

41. To the extent that China wished to invoke disciplines under the SPS Agreement, China had the option of claiming a breach of the fundamental equivalence provision under Article 4. China, however, chose not to cite Article 4. Instead, China cited other SPS provisions that are unrelated to equivalence determinations, or that, at most, do not add anything to the issues under Article XX that have been briefed by the parties.

42. Articles 2.2 & 5.1. China has not shown that Article 2.2 and 5.1 of the SPS Agreement apply to a measure – such as 727 – specifying the process to be used in the course of an ongoing equivalence determination. China's logic is vastly over-simplistic, ignores the context provided by the language of other provisions of the SPS Agreement, and (if applied) would result in absurd and often circular interpretations. As the panel discussed at length in the *EC – Biotech* dispute, the SPS Agreement cannot be applied in such a "mechanistic fashion."

43. Consider, for example, a procedure or requirement adopted in the course of conducting a risk assessment being undertaken in the application of a food safety measure. By the type of mechanistic reading adopted by China, the risk assessment procedure would itself be an SPS measure, and would need to be based on scientific evidence and a risk assessment under Articles 2.2. and 5.1. And on it would go: any secondary procedure adopted to find a scientific basis for the initial risk assessment procedure would itself require a scientific basis. This absurd result cannot be the proper way to interpret the broad scope of Articles 2.2/5.1 ("any SPS measure"), combined with the broad definition of "SPS measure" in Annex A.

44. In *EC – Biotech*, the panel addressed this interpretive issue by examining the context of other SPS Articles, and finding that Article 5.1 was intended to require a scientific basis not for any measure that might fall under Annex A, but only for measures "applied for achieving the relevant Member's appropriate level of sanitary or phytosanitary protection." Applying this type of reasoning to the present dispute, it is the PPIA itself – not Section 727 – which achieves the U.S. ALOP by requiring equivalence of the regulatory regimes of exporting Members. Section 727 does not itself provide the level of protection; rather, Section 727 is a procedural requirement adopted in the course of an ongoing equivalency review. As such, the SPS Agreement cannot be mechanistically interpreted – as China suggests – as requiring that this measure be based on sufficient scientific evidence or a risk assessment.

45. Moreover, the process of determining equivalence for an exporting Member's SPS measures is not the same as the process of performing a risk assessment of products imported from another Member. The determination that poultry poses a risk of being unsafe, and therefore that measures are needed to protect against that risk, pre-dates Section 727 and applies regardless of origin. Indeed, it is not contested in this dispute that imported poultry can pose a risk of being unsafe. Accordingly, the issue is not whether there is a basis for measures to ensure that poultry is safe. The only real issue is whether the proper procedure was being followed to make the

determination as to whether China's measures are equivalent to U.S. measures for poultry. This is not an issue for Article 2.2 or 5.1, but rather for Article 4.

46. Article 2.3. It is uncertain whether Article 2.3 is intended to apply to every procedural requirement adopted in the course of operating SPS measures, or whether – like Articles 2.2 and 5.1 – Article 2.3 should be applied to substantive SPS measures intended to achieve the importing Member's ALOP. Similarly, it is unclear whether, in the context of equivalency-based regimes, Article 2.3 was intended to apply in addition to the main SPS equivalence provision (Article 4.1). As noted, by their very nature, equivalence-based regimes must discriminate between different Members. Article 4.1 provides a specific type of claim that exporting Members may bring: namely, that they have objectively demonstrated equivalence to the importing Member's SPS measures. China's submissions have addressed none of these issues.

47. In the context of this dispute, the Panel has no need to reach any issue under Article 2.3. The language of Article 2.3 mirrors the language of the Article XX chapeau, and the United States has already explained why the U.S. measure meets the chapeau requirements. Similarly, China's Article 2.3 arguments are essentially the same as China's position regarding the application of the Article XX chapeau. Thus, in the context of this particular dispute, the Panel would have no need to address Article 2.3 because the very same issues have been examined under the Article XX chapeau.

48. Article 5.5. China's argument as to why Section 727 is inconsistent with obligations under Article 5.5 of the SPS Agreement is without merit – it fundamentally misconstrues the SPS Agreement and the U.S. measure at issue. China has not shown, and cannot show, that Section 727 resulted in distinctions in levels of protection in different situations. The PPIA establishes the level of protection for poultry, not Section 727: the basic question evaluated under the PPIA is whether each exporting Member's poultry safety system will result in the same level of protection as the U.S. system. And indeed, this is the fundamental description of "equivalence" provided under Article 4 of the SPS Agreement.

49. China's Article 5.5 argument also confuses the concepts of the ALOP and the measures applied to achieve the ALOP. A disagreement about whether, for example, a measure results in arbitrary discrimination under Article 2.3 or the Article XX chapeau does not automatically create a claim under Article 5.5 of the SPS Agreement. In short, under China's approach, any difference in the measures applied by a Member to various products would by definition mean that there is a distinction in the ALOP sought to be achieved by that Member. China's approach is incorrect – the SPS Agreement is clear that these two concepts are separate and distinct.

50. Article 5.6. The response of the United States to China's Article 5.6 claim is similar to that with respect to China's SPS Article 2.3 claim: China has not shown that Article 5.6 applies to a procedural requirement adopted in the context of an equivalency determination. Article 5.6 does not appear to apply to every procedural requirement adopted in the course of operating SPS measures. Instead, it appears to apply to substantive measures "establishing or maintaining" the importing Member's ALOP. In addition, it is difficult to see how the language of Article 5.6 applies in the context of equivalence determinations. In an equivalence regime, it is the exporting Member that chooses the SPS measures intended to achieve a level of protection, and the question for the importing Member is whether those measures achieve the result of equivalence. In this context, it is hard to apply Article 5.6, which turns on whether SPS measures chosen by the importing Member are more trade restrictive than required.

51. Article 8 and Annex C. China's arguments regarding alleged "undue delay" under Article 8 and Annex C(1)(a) of the SPS Agreement fail to show that Section 727 breaches those provisions. Article 8 and Annex C of the SPS Agreement apply to "control, inspection, and approval procedures," which do not include equivalence determinations described under SPS Article 4. In addition, China's Annex C "undue delay" claim adds very little, if anything, to the substance of China's arguments. Rather, China's Annex C argument is conclusory, merely stating that "China has already demonstrated, in connection with its other claims," that Section 727 is lacking in "justification" and results in "discrimination." But to the contrary, as the United States has shown, Section 727 falls squarely within the Article XX(b) exception and is both necessary under the meaning of Article XX(b), and not discriminatory under the meaning of the chapeau.